



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KEREM ÇİFTÇİ v. TURKEY

(Application no. 35205/09)

JUDGMENT

Art 5 § 1 • Unlawful detention in police custody, albeit brief, pursuant to withdrawn arrest warrant • Unreasonable and unacceptable delay in implementing withdrawal decision

Art 5 § 5 • Compensation • No enforceable right to compensation for the violation of Article 5 § 1

STRASBOURG

21 September 2021

FINAL

21/12/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kerem Çiftçi v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Jon Fridrik Kjølbro, *President*,

Carlo Ranzoni,

Aleš Pejchal,

Egidijus Kūris,

Branko Lubarda,

Marko Bošnjak,

Saadet Yüksel, *judges*,

and Hasan Bakırcı, *Deputy Section Registrar*,

Having regard to:

the application (no. 35205/09) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Kerem Çiftçi (“the applicant”), on 10 June 2009;

the decision to give notice to the Turkish Government (“the Government”) of the complaints concerning the lawfulness of the applicant’s detention in police custody and his right to claim compensation (Article 5 §§ 1 and 5 of the Convention), and to declare the remainder of the application inadmissible;

the parties’ observations;

Having deliberated in private on 31 August 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the detention of the applicant in police custody pursuant to an arrest warrant that had been withdrawn one month earlier, and the dismissal of his compensation claim.

THE FACTS

2. The applicant was born in 1970 and lives in Batman. He was represented by Ms M. Danış Beştaş and Mr M. Beştaş, lawyers practising in Diyarbakır.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 4 April 2006 an arrest warrant was issued by the Batman Criminal Court in respect of the applicant within the context of an investigation conducted into the PKK (Workers’ Party of Kurdistan, an illegal armed organisation). The purpose of the arrest warrant was to obtain a statement

from the applicant in relation to charges of: undermining the unity of the State and the integrity of the country by way of attacking security forces using stones, sticks and Molotov cocktails; being a member of a terrorist organisation; forcing enterprises to close; and causing damage to public and private property.

6. Subsequently, the Batman Chief Public Prosecutor's Office issued a decision in which it declined jurisdiction in respect of the applicant following the investigation it had conducted and sent the investigation file to the Diyarbakır Chief Public Prosecutor's Office, which filed a bill of indictment against the applicant.

7. On 26 December 2006 the Diyarbakır Assize Court held a hearing in the presence of the applicant and took statements from him. It decided to request that the Diyarbakır public prosecutor withdraw the arrest warrant before its execution (*çıkartılan yakalama emrinin bilaikmal iadesi hususunda C.Başsavcılığına müzekkere yazılmasına*).

8. On 24 January 2007 the decision requesting the withdrawal of the arrest warrant was received by the Diyarbakır Chief Public Prosecutor's Office. It was forwarded on the same day to the relevant authorities by the public prosecutor with a handwritten note, which read: "[T]he suspect was released, request from the security directorate for withdrawal of the arrest warrants."

9. On the same day at 11.50 a.m., having learned that he was wanted by the police, the applicant surrendered to the Batman police station in the presence of his lawyer in accordance with the above-mentioned arrest warrant and was taken into custody. As is apparent from the release report signed by both the officer and the applicant, the applicant was referred to the Batman public prosecutor's office, from where he was released at 1.25 p.m. According to the same report, during his detention the applicant was also examined by a forensic medical expert.

10. On 22 February 2007 the applicant brought a claim for compensation in the Batman Assize Court concerning his arrest, under Article 141 of the Code of Criminal Procedure. He argued that his detention in police custody had been unlawful since the arrest warrant in respect of him had already been withdrawn by the time of his detention. In his claim, he submitted that he had gone to the Batman police station in the presence of his lawyer after learning that he was wanted by the police. While there, he had been taken into custody without any reasons being given. He also argued that he had been taken into custody by the authorities even though he had with him the decision requesting the withdrawal of the arrest warrant.

11. On 3 October 2007 the Batman Assize Court dismissed the claim, holding the following:

"In the examination of the case file, it was understood that this action had been brought concerning the allegedly unjust detention in police custody in respect of the process which took place between 11.50 a.m. and 1.25 p.m. on 24 January 2007. It

was first observed from the case file of the 5th Chamber of the Diyarbakır Assize Court with docket no. 2006/166 that the complainant had been present at the hearing on 26 December 2006 and submitted his defence at that hearing and, for that reason, an interlocutory decision had been delivered to send a writ to the Chief Public Prosecutor's Office for the withdrawal of the arrest warrant without it having been executed. It was also determined that this letter had been delivered to the Chief Public Prosecutor's Office on 24 January 2007 and that the relevant public prosecutor had forwarded the correspondence with the note 'the suspect was released, request from the security directorate for withdrawal of the arrest warrants ...'. It was understood that the date on which the applicant had been unjustly placed in custody corresponded to the date mentioned, namely 24 January 2007. Besides, in the letter of reply from the Security Directorate of the Batman Governorship no. ... dated 10 May 2007, it was stated that on 24 January 2007, at around 11.50 a.m., the complainant had gone to the relevant police station together with a lawyer from the Batman Bar and had turned himself in, and that at 1.25 p.m. on the same day he had been referred to the Batman public prosecutor's office with the investigation document drawn up in respect of him, from where he had been released. In the light of all these findings, it was concluded that the conditions under Article 141 of the Code of Criminal Procedure were not met. Likewise, it was determined that the length of the custody period was reasonably and understandably short [*makul ve anlaşılabilir kısalıkta*], in other words, that the period spent in police custody was of an acceptable brevity, in view of the natural flow of life and inter-institutional functioning, to determine that the arrest warrant issued in respect of the individual had been null and void. In those circumstances, it was considered that [the allegation that] the individual, that is, the complainant, had been psychologically affected and had suffered damage as a result of his detention in police custody, which was of a very short (one hour and thirty-five minutes) and acceptable duration, was not in accordance with reality. On the basis of these conclusions and findings, it was decided that the case be dismissed as follows."

The Batman Assize Court specified in the operative part of its judgment that this judgment was subject to appeal [*temyiz yolu açık olmak üzere*].

12. On 31 October 2007 the applicant appealed against that judgment. In his appeal, he pointed out that approximately one month had elapsed between the date of the hearing regarding the withdrawal of the arrest warrant and his arrest, and that the relevant authorities had not been notified during that time of the withdrawal decision.

13. On 28 January 2009 the Court of Cassation rejected the applicant's appeal on the grounds that the subject matter of the dispute fell below the monetary threshold set out in the former Code of Civil Procedure (Law no. 1086).

RELEVANT LEGAL FRAMEWORK

14. Article 91 § 5 of the Code of Criminal Procedure ("the CCP") provides that an arrested person, or his or her representative, partner or relatives, may lodge an objection against an arrest, a police custody order or an extension of a police custody period with a view to securing the person's release. The objection must be examined within twenty-four hours at the latest.

15. Article 141 § 1 (a) of the CCP provides:

“Compensation for damage ... may be claimed from the State by anyone ...:

(a) who has been arrested or taken into or kept in detention under conditions or in circumstances not complying with the law;

...”

THE LAW

I. PRELIMINARY OBJECTIONS

A. Non-exhaustion of domestic remedies

16. The Government submitted that in accordance with Article 91 § 5 of the CCP, the applicant had been required to lodge an objection with the domestic courts in respect of his detention in police custody.

17. As regards the lawfulness and duration of the applicant’s detention in police custody, the Court observes that the Turkish legal system provides two remedies in this respect, namely an objection aimed at securing release from custody (Article 91 § 5 of the CCP) and a claim for compensation against the State (Article 141 § 1 (a) of the CCP) (see *Mustafa Avcı v. Turkey*, no. 39322/12, § 63, 23 May 2017).

18. As the applicant was released about an hour and a half after being taken into custody, and in so far as the remedy provided by Article 91 § 5 of the CCP was no longer available after his release, the Court considers that the applicant was not required to use it. The Court further notes that, following his release, the applicant brought a claim for compensation under Article 141 of the CCP in the domestic courts, which rejected the claim. In that connection, the Court has already held that where the applicant’s complaint of a violation of Article 5 § 1 of the Convention is mainly based on the alleged unlawfulness of his or her detention under domestic law, and where the detention has come to an end, the compensatory remedy provided for in Article 141 of the CCP is an effective remedy which needs to be pursued for exhaustion purposes (*ibid.*, § 67).

19. Therefore, as the applicant has availed himself of the domestic remedy which is provided for by Article 141 of the CCP (compare *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 101, 20 March 2018), the Court concludes that the objection raised by the Government on this account must be dismissed.

B. Lack of victim status

20. The Government contended that the Batman Assize Court had assessed the applicant’s complaints under Article 5 § 1 in detail and had rejected them, finding in a reasoned decision that he had no right to

compensation. They submitted that as the applicant's complaints had been assessed effectively by the domestic court under Article 141 of the CCP, the applicant did not have victim status. They brought to the Court's attention its findings in *Pentikäinen v. Finland* ([GC], no. 11882/10, § 111, ECHR 2015) and *Bédat v. Switzerland* ([GC], no. 56925/08, § 54, 29 March 2016), and pointed out that in those judgments the Court had not made a separate assessment, instead noting that the disputed matters had had a sufficient basis in the domestic law of the Contracting States. Thus, the Government asked the Court to declare the applicant's complaints inadmissible as sufficient reasons had been given by the Batman Assize Court and the applicant did not have victim status.

21. The Court notes firstly that the judgments cited above by the Government, namely *Pentikäinen* and *Bédat*, do not relate to a complaint under Article 5 of the Convention, but concern the examination of complaints under Article 10 of the Convention. The paragraphs referred to by the Government do not in any way concern the question of victim status; they relate to the general principles governing the necessity of an interference "in a democratic society" and to the Court's considerations in examining the merits of complaints lodged by applicants (in particular, the weight given by the Court to the balancing exercise carried out by the national authorities in accordance with the criteria established by the Court's case-law and its consideration of the relevance and sufficiency of the reasons for a judgment).

22. In the instant case, the Court notes that the arguments put forward by the Government in the context of their objection do not in any way concern the question of victim status. However, the Court considers it necessary to examine this aspect – as in the cases cited by the Government – in reviewing the merits of the complaint under Article 5 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

23. The applicant complained that he had been unlawfully deprived of his liberty since the arrest warrant in respect of him had already been withdrawn by the time of his arrest. The applicant relied on Article 5 § 1 of the Convention, the relevant parts of which provide:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having

committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...”

24. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

25. The applicant maintained that he had unlawfully been kept in police custody.

26. The Government argued that the online system had not been widely used at the time of the applicant’s arrest, so it was possible that it could have taken some time for the order by the relevant public prosecutor for the withdrawal of the arrest warrant by the Security Directorate to reach the region where the applicant was living. They also submitted that that order had been issued on the same day on which the applicant had been arrested. Lastly, the Government argued that the applicant had been released after what could be considered a reasonably short period of time.

27. The Court reiterates that Article 5 § 1 of the Convention requires in the first place that any detention be “lawful”, which includes the condition of compliance with a procedure prescribed by law. The Convention refers here essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 74, 22 October 2018). Furthermore, the list of exceptions to the right to liberty set out in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see, among many other authorities, *Blokhin v. Russia* [GC], no. 47152/06, § 166, 23 March 2016).

28. Turning to the circumstances of the present case, the Court notes that the applicant was in police custody for approximately an hour and a half. It is not disputed that he was accordingly “deprived of his liberty” within the meaning of Article 5 § 1 of the Convention.

29. The Court observes that on 4 April 2006 the Batman Criminal Court ordered the applicant’s arrest on suspicion of undermining the unity of the State and the integrity of the country by way of attacking the security forces using stones, sticks and Molotov cocktails; being a member of a terrorist organisation; forcing small and medium-sized enterprises to close; and causing damage to public and private property. It notes, however, that during the hearing held on 26 December 2006, the Diyarbakır Assize Court took the applicant’s statements and requested that the Diyarbakır public prosecutor withdraw the arrest warrant before its execution. Despite the withdrawal of the arrest warrant, the applicant was taken into custody about

one month later pursuant to that same arrest warrant (see paragraph 9 above), because the decision to withdraw the arrest warrant before its execution had not yet been transmitted to the Batman police. In such circumstances, the Court needs to examine whether the applicant's detention in police custody, despite the withdrawal of the arrest warrant, could nevertheless be considered lawful within the meaning of Article 5 of the Convention.

30. On this point, the Court notes that the lawfulness of the applicant's detention in police custody was the subject of an examination by the Assize Court, in the context of the action for damages under Article 141 of the CCP. In that connection, the Court observes that it is in the first place for the national authorities, and notably the courts, to interpret domestic law, and in particular rules of a procedural nature, and the Court will not substitute its own interpretation for theirs in the absence of arbitrariness. However, since failure to comply with domestic law may entail a breach of Article 5 § 1 of the Convention, it follows that the Court can and should exercise a certain power to review whether the domestic law has been complied with (see *Toshev v. Bulgaria*, no. 56308/00, § 58, 10 August 2006, and *Shteyn (Stein) v. Russia*, no. 23691/06, § 89, 18 June 2009).

31. The Court notes that the Assize Court rejected the applicant's action on the grounds that the length of his period in police custody could be considered reasonable and appropriate taking into account "inter-institutional functioning" and the "natural flow of life"; in other words, in the Assize Court's view, this duration was reasonable for the determination by the legal authorities of whether the arrest warrant in respect of the applicant was valid. The Court notes here that while assessing the applicant's claim for compensation, the Assize Court mainly took into consideration the length of time the applicant had spent in police custody and not the period needed to implement the withdrawal of the arrest warrant. The Assize Court merely pointed out that the Diyarbakır public prosecutor had received the decision given by the Diyarbakır Assize Court requesting the withdrawal of the arrest warrant on the same day as the applicant's arrest, and had notified the relevant authorities of the withdrawal of the arrest warrant on the same day that he had received that decision. Thus, the Court considers that the decision given by the domestic court concerning the applicant's compensation claim did not contain relevant and sufficient reasoning concerning the period needed to implement the withdrawal of the arrest warrant.

32. The Court observes that it has already examined cases relating to the wrongful arrest of applicants when the basis for their detention had ceased to exist, as a result of administrative shortcomings in the transmission of documents between various State bodies. It found a violation of Article 5 of the Convention in *Velinov v. the former Yugoslav Republic of Macedonia* (no. 16880/08, 19 September 2013), in which the applicant was arrested and

detained over eight months after he had paid the fine that had been converted into a detention order, and in *Oprea v. Romania* (no. 26765/05, 10 December 2013), where the applicant was arrested under a warrant for the execution of his sentence, which had been revoked more than two months before his arrest.

33. The Court sees no reason to reach a different conclusion in the present case. Even if the period observed in the present case – almost one month – for the implementation of the decision to withdraw the arrest warrant was shorter than in the above-mentioned cases in which it found a violation (see *Velinov* and *Oprea*, both cited above), the Court considers that that period cannot be regarded as reasonable and acceptable. The Diyarbakır Assize Court took almost a month simply to transmit to the public prosecutor of the same city its decision to withdraw the arrest warrant. In that connection, the Court notes that when the contested deprivation of liberty has no legal basis from the outset, as in the present case, a strict approach is required (see *Oprea*, cited above, §§ 27-28). It further notes that having learned that he was wanted by the police, the applicant surrendered to the Batman police station in accordance with the arrest warrant, in the presence of his lawyer. According to the compensation claim he brought on 22 February 2007 (see paragraph 10 above), at the time of his arrest the applicant had been carrying the decision given by the Diyarbakır Assize Court requesting the withdrawal of the arrest warrant in respect of him.

34. In the light of the foregoing, the Court considers that the applicant's detention in police custody despite the fact that the arrest warrant had been withdrawn, even if only for a brief period, was unlawful. There has therefore been a violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

35. The applicant complained that he had no right to claim compensation under domestic law in respect of his complaints under Article 5 of the Convention. He relied on Article 5 § 5 of the Convention, which reads as follows:

“Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

36. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

37. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to Article 5 §§ 1, 2, 3 or 4 (see *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A). The right to compensation set forth in Article 5 § 5 therefore presupposes that a

violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court (see *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X).

38. The Court notes that it has found that the applicant's detention in police custody was unlawful under Article 5 § 1 of the Convention (see paragraph 34 above). It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether Turkish law afforded the applicant an enforceable right to compensation for the breach of Article 5 in this case. In that connection, the Court observes that the applicant brought a claim for compensation under Article 141 of the CCP in the Batman Assize Court concerning his detention in police custody, and that the claim was dismissed. It follows that, in the applicant's case, Article 141 of the CCP did not provide an enforceable right to compensation for the breach of his right under Article 5 § 1 of the Convention.

39. There has accordingly been a violation of Article 5 § 5 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

41. The applicant claimed 100,000 Turkish liras (TRY, approximately 15,850 euros (EUR) according to the exchange rate at the relevant time) in respect of non-pecuniary damage. The applicant also sought an award in respect of pecuniary damage but left the amount to the discretion of the Court.

42. The Government contested these claims.

43. The Court notes that there is no evidence before it of any pecuniary damage. On the other hand, it awards the applicant EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

44. The applicant also claimed TRY 12,000 (approximately EUR 1,900) for the costs and expenses incurred before the domestic courts and the Court.

45. The Government found the sum claimed unjustified and excessively high.

46. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

47. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 §§ 1 and 5 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses*, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 September 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Deputy Registrar

Jon Fridrik Kjølbro
President